UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

LIFEWAY FOODS, INC.,

Employer,

and **Case 13-RC-113248**
Stipulated

BAKERY, CONFECTIONARY,
TOBACCO WORKERS, AND
GRAIN MILLERS INTERNATIONAL UNION,
LOCAL UNION NO. 1,

Petitioner

LIFEWAY FOODS, INC.'S REPLY TO PETITIONER'S ANSWERING BRIEF

Dated: January 2, 2015

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and	)	**Case 13-RC-113248**
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Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, Local Union No. 1	)	

LIFEWAY FOODS, INC.'S REPLY TO PETITIONER'S ANSWERING BRIEF

I. The Hearing Officer violated Lifeway's due process rights by permitting an insufficiently skilled Spanish-language translator to repeatedly mistranslate and fail to translate the proceedings, despite the Company's objections, and refused to permit the Company an opportunity to challenge inaccurate translations.

Petitioner fails to engage or refute any portion of the critical exchanges outlined in the Company's Brief. (Er. Br. at 24-28). Instead, Petitioner focuses on—and misleadingly cites—one isolated portion of the transcript. Petitioner claims that the Hearing Officer supposedly "pointed out that . . . objections should be made" to the translations. (Pet'r Br. 12 (citing Tr. 733-37)). However, when the Company's attorneys attempted to offer objections, the Hearing Officer refused to accept them, ultimately concluding that he did not want to "undermine" the interpreter or "get into dueling interpretations" and would "rely[] upon the expertise of the interpreter" instead. (Tr. 734-35).[1] This objectionable conduct is precisely the opposite of hearing officers' duties. *See* NLRB Gen'l Counsel Memo., OM 06-75 (June 26, 2006); *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1121 (7th Cir. 1986). Notably, Petitioner ignores these unfavorable facts.

[1] Petitioner offers no authority for its proposition that a party must move to disqualify a translator to preserve its objections. (*See* Pet'r Br. at 12). Even if such a requirement existed in case law, which it does not, the Hearing Officer's refusal to entertain any objections demonstrates that any such motion would have been futile.

Petitioner also refers in passing to a "similar exchange" on pages 749-50, but tellingly omits any detail about what kind of "exchange" occurred. (Pet'r Br. at 12). As explained in the Company's Brief (Er. Br. at 27-28), the mistranslation at issue here was central to the Company's objection that Board Agent Schlabowske allowed Petitioner's observer to challenge a group of people ("them") and not one person at a time ("that person"). (Tr. 750). Even though the Company explained that the translation mistakes "materially change[d] the answer," the Hearing Officer declined to give Lifeway an opportunity to challenge the translation. (Tr. 750). The only two examples Petitioner cites demonstrate clearly that the Hearing Officer's errors materially affected the Company's case on these key points and his ability to make a decision.

II. The Hearing Officer violated Lifeway's due process rights by conducting substantive proceedings off the record and refusing to put the proceedings on record, over the objections of the Company.

As discussed in the Company's Brief (Er. Ex. 28-30), the Hearing Officer required the parties to conduct lengthy, substantive off the record discussions with him. (*See, e.g.*, Tr. 690, 694-95). Petitioner claims erroneously that this portion of the transcript shows that the Company had "agree[d]" to go off the record. (Pet'r Br. at 13 (citing Tr. 695)). However, the only "agreement" on transcript page 695 is the Company's agreement about certain aspects of its position on two employees, not any agreement to conduct substantive proceedings off the record. The Hearing Officer ignored the Board's guidance when he declined to make his off the record comments a part of the record when counsel requested that he do so. *See, e.g.*, *Roto Rooter*, 288 NLRB 1025, 1026 n.2 (1988).

III. The Hearing Officer violated Lifeway's due process rights by, over objections, allowing Petitioner's witness to testify a second time in contradiction to her prior testimony, coaching Petitioner on evidence, and presenting arguments for Petitioner.

Over numerous objections, the Hearing Officer allowed Petitioner's witness, Ms. Zavala, to testify a second time on a second day to contradict her prior, damaging testimony about her actions and instructions to observers not to allow "any women to vote" and to challenge all drivers. Petitioner's response overlooks the most egregious instances in the record (Tr. 825, 831-32, 836-37, 841-44, 860-63, 893; *see also* Er. Br. at 9-13, 30-33), and intentionally obfuscates and selectively quotes others. For instance, the Hearing Officer stopped Petitioner's counsel in the middle of her witness examination and "point[ed] out" that her witness had stopped giving specific answers, inviting her to then continue with his guidance in mind. (Tr. 736, ll. 7-10; *see also* Er. Br. at 30-33). Petitioner's response brief instead focuses on an earlier statement. (*See* Pet'r Br. at 14 (apparently citing Tr. 736, ll. 5-6)).

Petitioner's obfuscation continues when it contends that the Hearing Officer only asked about the relevancy of three exhibits, and ruled on a hearsay objection. (*See* Pet'r Br. at 14 (apparently citing Tr. 769, ll. 9-10; Tr. 772, ll. 22-24; Tr. 773, ll. 11-17; Tr. 809, ll. 1-2). Once again, though, Petitioner stops too soon. In the first instance, the Hearing Officer did not wait for Petitioner to explain the relevancy of the exhibit. He immediately continued by explaining how he planned to apply the evidence based on what it "goes to" and what it showed about the actions of certain people. (Tr. 769, ll. 11-13). Contrary to Petitioner's representation, rather than letting Petitioner respond to a later relevance objection, the Hearing Officer simply explained what argument Petitioner was making ("she's making an argument based upon . . .") and how he was applying the evidence to that argument ("[Petitioner is] giving this as one of the reasons."). (Tr. 773, ll. 11-17). Later, when the Hearing Officer did rule on one of the Company's hearsay

objections (Tr. 809, ll. 1-2), he again did not stop there, but continued by prompting Petitioner on what evidence it should offer, explaining that he was "not sure we need evidence" on a particular matter and telling Petitioner to focus on adducing evidence on the witnesses' "state of mind" instead. (Tr. 809, ll. 3-9). This prompting was inappropriate and objectionable, not part of any rulings.

Petitioner completely overlooks other examples that the Company cited (*e.g.*, Tr. 626, 632, 822; *see also* Er. Br. at 32-33), and ignores the most egregious situation where the Hearing Officer simply argued in Petitioner's place about what arguments Petitioner was making, how to properly use the exhibits and evidence to support those arguments, and how to apply that evidence to the overall case. (Tr. 907-09; *see also* Er. Br. at 32-33). Petitioner's generalized response in no way refutes the substantial bias the Company's Brief outlines.

IV. The Hearing Officer violated Lifeway's due process rights by relying on the wrong legal standards, repeatedly misunderstanding and confusing key testimony from both parties, and by issuing a Report that is disorganized, contradictory, and fails to cite to any part of the record.

Petitioner agrees that the Board will overturn an election if "there is misconduct which has effected [sic] *or has a reasonable tendency to [a]ffect* the outcome of the election." (Pet'r Br. at 2 (citing *Delta Brands, Inc.*, 344 NLRB 252 (2005) (emphasis added)); *see also* Emp'r Br. at 34 (citing same standard in *Masonic Homes of Cal.*, 258 NLRB 41, 48 (1981)). Petitioner also cites *Affiliated Computing Services*, 355 NLRB 899 (2010), (Pet'r Br. at 3), where the Board repeatedly confirmed that it judges misconduct based on the misconduct's objective tendency to affect a reasonable employee. *Id.* at 899, at *2. However, Petitioner overlooks that this is not the standard the Hearing Officer used. Instead, he required subjective evidence of interference with or effect on voters (*E.g.*, HOR 2, 6, 10-13, 16), to which the Company rightly excepted. The Hearing Officer's decision applied many other wrong or non-existent legal standards, too, as

outlined in the Company's Brief. (Er. Br. 34-35). By doing so, the Hearing Officer reached erroneous and unsupported conclusions and made numerous factual errors and misstatements. Notably, Petitioner's response fails to address any of these fatal mistakes.

Rather than addressing any of these legal issues, Petitioner offers a confusing argument that misstates both the record and the Board's standard of review, and then summarily concludes that it need not respond to the majority of the Company's Brief. (*see* Pet'r Br. at 3-4). Petitioner erroneously claims that Mr. de la Fuente testified that five employees who complained to him about being prohibited from voting by Board Agent Schlabowske "were stipulated not to be eligible voters." (Pet'r Br. at 3). However, the four names that Mr. de la Fuente recalled were eligible voters on election day. (*See* Jt. Ex. 1).[2] Petitioner offers no evidence about the fifth voter. Similarly, Petitioner contends that its observer, Jesus Adan, "testified that no group of employees was asked to leave the voting area." (Pet'r Br. at 3 (citing Tr. 748)). However, Mr. Adan only testified that he did not remember. (Tr. 748).

Furthermore, Petitioner's response misstates the Board's "clear preponderance of the evidence" standard by contending that it applies to the Hearing Officer's "fact finding process and his factual findings." (*See* Pet'r Br. at 4). The Board has repeatedly held that this standard "does not apply to a judge's factual findings or the judge's derivative inferences or legal conclusions. Instead, *Standard Dry Wall Products* holds that the Board is to 'base [its] findings as to the facts upon a de novo review of the entire record[.]'" *Plaza Auto Center, Inc.*, 360 NLRB No. 117, at *10 (2014) (quoting *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950)). Contrary to Petitioner's insinuation, "[t]he Board is free to draw different derivative inferences and conclusions from the evidence than" a hearing officer. *Id.* at *10 (internal citations omitted).

[2] On the eve of the hearing two months later, as part of a global agreement on a range of issues narrowing the hearing's scope, the parties agreed to stipulate that three of those five employees would not be eligible. (Jt. Ex. 1).

As explained in detail in the Company's Brief (Er. Br. 33-36), which Petitioner wholly and intentionally ignored, the record compels the Board to do so here.

V. The Hearing Officer erred when he found that Petitioner's instructions to its observers not to allow "any women to vote," to challenge all drivers and its decision to make wholesale challenges to voters, like shipping logistics and drivers expressly included in the 2009 Decision and Stipulated Unit, did not destroy laboratory conditions and was not objectionable conduct.

Petitioner attempts misdirection in its response on this issue, claiming that merely making challenges is not objectionable conduct. (Pet'r Br. at 5 (citing *Iowa Packing Co.*, 48 NLRB 305 (1943)). However, the issue in this case is not Petitioner's use of challenges, but Petitioner's use of challenges without good cause. *See* 29 C.F.R. § 102.69. In *Iowa Packing*, the petitioner challenged certain voters based on their specific duties as "instructors." *Iowa Packing Co.*, 48 NLRB at 306. Each of the relevant cases Petitioner cites involved good cause challenges based on employee duties. *Wells Fargo Alarm Servs.*, 289 NLRB 562 (1988) (challenges to statutory supervisors based on their duties); *Ne. Iowa Tel. Co.*, 341 NLRB 670 (2004) (same).[3] Here, Ms. Zavala "specifically told" the observers that Petitioner would be "challenging the women," not because of their duties, but because Zavala saw that those women "went into the office" and wore "regular clothes." (Tr. 824). Even when an observer twice questioned whether these types of challenges were appropriate (Tr. 634, 646; Er. Ex. 21), Ms. Zavala persisted, reiterating that the observer "should challenge women" and drivers (Tr. 833), the latter in direct contravention of the stipulated election agreement based on the Regional Director's earlier decision. (*See* Er. Br. at 9-13, 36-39). The Hearing Officer found that Petitioner "challenged the ballots of [certain] employees based in large part on their work location," and not their duties. (HOR 12). This

[3] Contrary to Petitioner's claim, *GEO Corrections Holdings*, 2013 WL 6252458 (NLRB Dec. 3, 2013), is silent about challenges, but the exceptions brief that the Board considered states that the hearing officer found that the petitioner had challenged voters based on their duties. Neither *Beverly California Corporation*, 319 NLRB 552 (1995) (Board review of Regional Director's decision), nor *Toledo Hospital*, 315 NLRB 594 (1994) (*postelection* unit modification), is relevant here.

conduct, along with challenges based on "Unknown" or "Other" reasons (Er. Ex. 8; *see also* Er. Br. 13, 21) and challenges to other employees clearly included in the unit, destroyed laboratory conditions. (Tr. 534-51; *accord* Tr. 175-77; *see also* Er. Ex. 2, at 106-09; Er. Ex. 1, at 3). Petitioner's actions raise an inference of deterring employees' exercise of Section 7 rights. *E.g.*, *S.T.A.R., Inc.*, 347 NLRB 82, 84 n.7 (2006). Contrary to Petitioner's claims (Pet'r Br. at 6-7), no subjective evidence of interference is required. *Id.* As discussed above, the Board applies an objective, reasonableness standard when evaluating conduct that interferes with employee free choice. *E.g.*, *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004).

VI. The Hearing Officer erred when he found that misconduct by Board Agents at Morton Grove, including prohibiting eligible voters from casting votes and then removing them from the polling area in view of other voters, permitting Petitioner's observers to maintain and mark the "red lists," and giving substantive assistance to Petitioner's observers during the morning and afternoon sessions at Morton Grove did not destroy laboratory conditions and was not objectionable conduct.

Petitioner's Morton Grove observer kept and marked handwritten "red lists" of voters on the table in full view of all voters throughout the polling session at Morton Grove. (Tr. 497-99 (Company), 738 (Petitioner); *see also* Er. Br. at 11, 14-24, 39-41). Petitioner's observers then returned their red lists to Petitioner with notations as to who voted and who did not. (*See* Er. Exs. 17-18). This conduct "is prohibited and is grounds in itself for setting aside the election when"—as here—"it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *Days Inn Mgmt. Co.*, 299 NLRB 735, 737 (1990). Petitioner cites two distinguishable cases involving situations where the observers made no markings on the challenge lists and the lists were "only used for that purpose," not returned to petitioners with markings as to who voted and who did not. *Regency Grand Nursing*, 354 NLRB 530, 537 (2009); *accord Mead So. Wood Prods.*, 337 NLRB 497 (2002).

The litany of uncontroverted Board Agent misconduct at Morton Grove is staggering:

- A non-Board Agent handling unused ballots;
- Board Agents losing custody of ballot boxes (reported by Petitioner, no less);
- Board Agents allowing Petitioner to maintain and mark its own "red list" of voters in full view of voters;
- Board Agent Ocampo making challenges on Petitioner's behalf;
- Board Agent Schlabowske prohibiting eligible voters from casting votes and then removing them from the polling area in view of other voters;
- Board Agent Treadway taking marked ballots from voters;
- All of the Board Agents failing to explain challenges to challenged voters;
- All of the Board Agents failing to wear identification or identify themselves.

(Er. Br. 13-22, 39-44). Any or all of these events would be sufficient to overturn the election alone. In the aggregate, the cumulative effect of the incidents is sufficient to warrant setting aside the election. Petitioner attempts to excuse these issues by claiming without any legal authority that witness testimony is insufficient to substantiate them and by citing a single case involving just *one* of these issues. (*See* Pet'r Br. at 9). In *Kirsch Drapery Hardware*, 299 NLRB 363 (1990), the Board found no significant impairment of the election when a Board agent handled marked ballots because, unlike this case, the Board found no evidence of ballot tampering or other improper conduct. *See id.* at 364. The *Kirsch Drapery Hardware* Board did not confront anything like the litany of issues here. In the aggregate, the Board Agents failed to safeguard the "accuracy and security thought to be optimal in typical election situations" and their actions "raise[] a reasonable doubt as to the fairness and validity of the election." *Polymers Inc.*, 174 NLRB 282 (1969).

VII. The Hearing Officer erred when he found that Board Agent Galliano's substantive assistance to Petitioner's "shy" observer at Niles did not destroy laboratory conditions and was not objectionable conduct.

As discussed in its Brief, Lifeway did precisely what the Board requires in situations that otherwise contemplate calling a Board Agent as a witness: obtain evidence from sources other than the Board employee. The Company outlined the Board's requirements in detail and

explained why its evidence was admissible and why Board Agent Galliano's actions "could reasonably be understood to indicate that the Board opposed" Lifeway in the election. *Glacier Packing Co., Inc.*, 210 NLRB 571 (1974). Just as at the hearing, Petitioner elected not to address this in its response, claiming only that the evidence from non-Board employee sources was "non-evidence" that it need not rebut. (Pet'r Br. at 10). Petitioner presents no legal arguments or reasons that could refute the Company's position or support the Hearing Officer's refusal to accept and weigh this evidence.

VIII. The Hearing Officer erred when he found that the Region's loss of the challenge envelope and ballot of voter Brianne Sadowski and failure to maintain custody of ballot boxes did not destroy laboratory conditions and was not objectionable conduct.

Prior to the hearing, the parties stipulated that "the Company placed Brianne Sadowski on the *Excelsior* list, [and] that the Union did, in fact, challenge her vote at Niles." (Jt. Ex. 1). Consistent with the parties' stipulation, Mr. Ackerman, the Company's observer, recalled Ms. Sadowski came in to vote, that Petitioner's observer challenged her, that he and the other observer "checked her and she voted." (Tr. 557, 600). Board Agent Galliano's uncontroverted list of challenges confirmed this: Ms. Sadowski voted under challenge as a Graphic Designer. (Er. Ex. 12; *see also* Er. Ex. 10). Petitioner does not attempt to cite to the record or respond to this evidence; it simply pretends as though none of it exists. (*See* Pet'r Br. at 11). Instead, Petitioner advances a "no harm, no foul" argument that one ballot would not have affected the outcome of the election. However, as the Board has explained, neither subjective evidence of ballot mishandling nor an actual swing in the election result is necessary. *Paprikas Fono*, 273 NLRB 1326 (1984). The Board "act[s] dutifully to set aside elections whenever there is <u>any appearance</u> of irregularity in the handling of ballots," as there clearly is here. *Id.* (emphasis added).

CONCLUSION

For the reasons above, and as set forth in its Exceptions and accompanying Brief in Support of Exceptions, Employer Lifeway Foods, Inc. respectfully requests that the Board reject the Hearing Officer's Report and Recommendations and sustain Lifeway's Objections to Conduct Affecting the Results of the Election.

Respectfully submitted,

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Dated: January 2, 2015

CERTIFICATE OF SERVICE

The undersigned attorney certifies that on January 2, 2015, he caused a copy of the foregoing Exceptions and Brief in Support of Exceptions to be filed with the National Labor Relations Board by using the E-filing system on the Board's website and caused additional copies to be served on January 2, 2015 as follows:

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